



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: General Instrument Corporation

File: B-228053

Date: December 8, 1987

DIGEST

1. Where the only reasonable reading of the awardee's best and final offer (BAFO) is that one of two specified prices would apply to labor hours ordered up to a maximum quantity, there is no merit to the protester's contentions that the awardee failed to offer a price for these hours and that the agency's post-BAFO communication with the awardee to confirm its understanding of the offer constituted discussions.
2. Where the lowest overall cost is not the paramount basis for source selection, protester's speculation that acceptance of an unbalanced offer may not result in the lowest overall cost to the government does not, in itself, warrant rejection of the offer, where there is no reason to think the agency would not accept the offer even if the projected costs of such award were higher; the offer will result in lowest cost unless actual orders fall far short of estimated quantities; and the agency is confident its estimates are accurate.

DECISION

General Instrument Corporation protests the Department of the Navy's award of a contract to Raytheon Corporation under request for proposals (RFP) No. N00189-86-R-0041. The contract is for installation and maintenance support services for naval electronic warfare systems. We deny the protest.

The RFP contemplated an indefinite delivery/indefinite quantity, time-and-materials contract with fixed-price straight time and overtime rates for manhours (MH) in 19 labor categories. The agency requested prices for the 19 categories using the following pricing schedule:

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ITEM	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
		<u>ESTIMATED</u>	<u>NOT TO EXCEED</u>		
0001	Design Eng./Project Mgr.				
0001AA	Straight time rate	5000	7,500 MH	_____	_____
0001AB	Overtime rate	100	150 MH	_____	_____

The RFP directed offerors to "price their proposals based on the 'Estimated Quantity' only." For evaluation purposes the unit prices for the line items were to be extended by the estimated quantities. The RFP provided that technical factors would be worth one and one-half times as much as cost in selecting an awardee, but that the importance of cost would increase as technical proposals approached equality.

Following the submission of revised proposals, Raytheon's cost proposal was evaluated at \$28,995,223; its technical proposal received 762 out of a possible 1,000 points. Its weighted score, including both technical and cost factors, was 85.89. The protester's evaluated cost was \$31,229,124, its technical score was 569 and its weighted score was 71.10. The agency requested and received best and final offers (BAFOs). Raytheon's BAFO deviated from the prescribed format by splitting the estimated quantities of straight time hours for most labor categories into two blocks and pricing the first blocks at higher unit prices than the second. For example:

	<u>ESTIMATED</u>	<u>NOT TO EXCEED</u>		
"0001 Design Eng./Project Mgr.				
0001AA Straight time rate	5000	7,500 MH	_____	_____
First 2500 hours ordered		\$43.00	\$107,500	
Second 2500 hours ordered		\$30.35	\$ 75,875	
0001AB Overtime rate	100	150 MH	<u>0.00</u>	<u>0 "</u>

For some labor categories, Raytheon priced the second block of hours at zero. It priced all overtime and foreign/sea duty hours at zero.

Raytheon explained in its BAFO that, as required by the RFP, it was proposing rates for the total estimated quantity of

hours for each item and that "[t]here is a price for the initial hours ordered under a line item, as well as a price for all hours ordered above those initial hours." This statement was followed by an example involving a line item with an estimated quantity of 60,000 hours and a not-to-exceed quantity of 90,000 hours. Raytheon stated that it would be paid at a specified rate for the first 30,000 hours and "[f]or any of the 30,000 hours ordered subsequent to the first 30,000 hours" it would be paid at a specified lower rate. Raytheon further explained that in accordance with the terms of the RFP the agency should evaluate its offer by adding the extended price for the first block of 30,000 hours to the extended price for the second block of 30,000 hours. The example did not address the line item's not-to-exceed quantity.

The Navy was concerned about Raytheon's BAFO pricing scheme. The agency therefore contacted Raytheon and requested confirmation that the second, or lower, rates proposed for hours within the estimated quantities would apply to hours ordered above those levels up to the not-to-exceed quantities; that hours priced at zero dollars would be provided at no cost to the government; and that Raytheon would comply with Service Contract Act requirements notwithstanding its pricing of some labor hours at zero. Raytheon confirmed each of these points in writing. Raytheon's final evaluated cost was \$24,622,501;^{1/} the protester's was \$27,088,284. The weighted scores were 96.9 for Raytheon versus 88.6 for the protester. The Navy awarded a contract to Raytheon.

The protester objects to the award to Raytheon on a number of grounds. First, the protester contends that Raytheon failed to offer to perform any hours in excess of the

^{1/} The RFP's initial pricing schedule required prices for an estimated 8,000 straight-time hours for electronics field engineers in the second option year. (Line item 0055AA.) The agency reports that this figure should have been 80,000, and that although the error was noted and corrected by amendment No. 3, the error occurred again when the agency later revised the pricing schedule. Raytheon submitted a single BAFO price for 8,000 hours, while the protester and a third offeror submitted prices for 80,000 hours. The agency recognizes the impact this had on the evaluation and has recalculated Raytheon's offer for evaluation purposes based on 80,000 hours for this line item. The error affected only the evaluation and not the total number of hours that may be ordered since Raytheon's BAFO commits the firm to provide up to the not-to-exceed quantity for this item of 120,000 hours.

estimated quantities up to the not-to-exceed quantities. The protester's position is that by offering two prices for the estimated quantities, the proposal did not make clear what price, if any, would apply to hours in excess of the estimated quantities and therefore fell short of a firm commitment to perform those hours. Further, argues the protester, the agency acted improperly in attempting to cure this proposal deficiency by reopening negotiations with Raytheon. The protester contends that the agency sought from Raytheon information that was essential for determining the acceptability of the proposal and allowed the firm to revise or modify its proposal. The protester argues that the agency should have provided the same opportunity to all offerors in the competitive range.

The protester also contends that acceptance of Raytheon's offer was improper because the offer is materially unbalanced. In this regard, the protester notes that as to almost every labor category Raytheon's split pricing scheme is front-loaded. The protester also cites our decision in Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 C.P.D. ¶ 582, for the proposition that a contractor should not be paid inordinately large amounts early during contract performance. In addition, the protester contends that rejection of Raytheon's proposal was required under our decision, The Orkand Corp., et al.--Reconsideration, B-224466.2, et al., Jan. 23, 1987, 87-1 C.P.D. ¶ 88, in which we upheld the rejection of a bid that priced several labor categories at zero on the basis that acceptance of the bid would have created significant cost and performance risk for the government.

There is no merit to the protester's contention that the Navy was required to reject Raytheon's proposal for failure to commit the firm to perform all hours up to the not-to-exceed quantities. Raytheon expressly stated in its BAFO that it was offering one price for the first block of hours within each line item "as well as a price for all hours ordered above those initial hours." (Emphasis supplied.) In our view, the only reasonable reading of this statement is that the second price applied to all hours up to the not-to-exceed quantities. We recognize that this statement is followed by an example that discusses only a particular line item's estimated quantity, but as we read the example, it is intended as an illustration of how Raytheon believed the agency should evaluate its BAFO under the terms of the RFP and not as a limitation on the firm's commitment to provide all hours up to the not-to-exceed quantities.

Further, we conclude that the agency's post-BAFO communication with Raytheon did not constitute discussions. The Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.601

(1986), defines "discussions" as communications between the government and an offeror that either involve information essential for determining the acceptability of a proposal or provide an opportunity for proposal revision. Here, there is no indication that the Navy considered Raytheon's proposal, as amended by its BAFO, to be unacceptable; the Navy reports that its telephone contact with Raytheon was intended simply to confirm its reading of the firm's pricing scheme and to avoid mistake claims. The Navy did not afford Raytheon an opportunity to revise its proposal. In our view, the post-BAFO communication with Raytheon merely clarified the Navy's understanding of matters that were reasonably clear from the proposal as submitted and therefore did not constitute discussions. See Anchorage Telephone Utility, B-197749, Nov. 20, 1980, 80-2 C.P.D.

¶ 386. In any event, while the protester contends that the agency should have reopened discussions with all offerors, the protester has not shown how it may have been prejudiced by the Navy's failure to do so. Specifically, the protester has not shown how, if given the opportunity, it would have improved its proposal to overcome Raytheon's technical and price advantage.

With respect to the protester's contention that the agency should have rejected Raytheon's offer as unbalanced, our review of alleged unbalanced pricing generally involves two aspects. The first is a mathematical evaluation of the bid or offer to determine whether each item carries its share of the cost of the work plus profit. Here, the agency's analysis of Raytheon's BAFO indicates that the firm's prices for the first blocks of hours under the estimated quantities reflect a significantly higher allocation of the firm's overhead expense pool than allocated to the second blocks and include all of the anticipated profit. Obviously, the hours priced at zero dollars carried none of the costs or profit. The offer thus appears to be mathematically unbalanced.

A mathematically unbalanced bid or offer may be accepted, however, unless it is also materially unbalanced. When a contract is to be awarded based solely or primarily on low cost or price, material unbalancing exists when there is a reasonable doubt that acceptance of a low, mathematically unbalanced bid or offer ultimately will result in the lowest overall cost to the government.

Here, lowest ultimate cost was not the paramount basis for source selection, as often is the case in negotiated procurements, so that this aspect of unbalancing is not, in itself, the determinative factor in the acceptability of Raytheon's offer. See Merret Square, Inc., B-220526.2, Mar. 17, 1986, 86-1 C.P.D. ¶ 259. The concern on which our

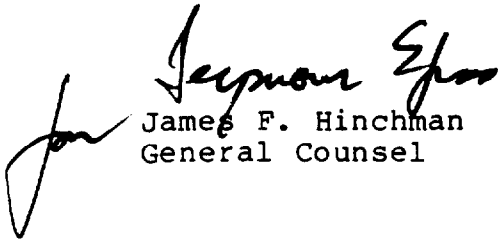
decisions on material unbalancing focus may not be relevant where technical factors are paramount, since the procurement in the first instance reflects the government's intent to rely on other than lowest cost in selecting a contractor. In this case, the solicitation provided that award would be based on the proposal representing the greatest value to the government in terms of performance rather than on price alone. The RFP stated that the technical area would be worth 50 percent more than cost (with the importance of cost increasing as proposals approached technical equality) and the agency used a 60-percent-technical/40-percent-cost weighting to calculate a greatest value score (GVS) for each proposal; Raytheon's proposal received the highest technical score and the highest GVS. We have no reason to think that the Navy, given the evaluation scheme it set up, would not have accepted Raytheon's offer even if the projected costs of such an award were somewhat higher than they appeared from the proposal itself. Raytheon's evaluated cost was more than \$2.4 million lower than the protester's.

In any event, given the difference in evaluated cost, Raytheon's offer in fact will result in the lowest cost unless the labor hours actually ordered fall far short of the estimated quantities. In this respect, the Navy reports that it reviewed its estimates on several occasions and that it is confident the estimates are accurate. While the protester faults the agency's estimating methodology, it has not shown that the estimates are inaccurate.

Finally, we do not agree that the Navy was required to reject Raytheon's offer under either Nebraska Aluminum or Orkand. In Nebraska Aluminum we said that rejection of an offer containing a first-article price grossly disproportionate to value was appropriate since payment of such a price would be tantamount to an advance payment. The front loading here is not nearly as egregious as what occurred there, however, where the first article price was 1,000 times more than the price for production quantities. Our holding in Orkand was that submission of below-cost prices for labor categories may be grounds for rejection where the agency is concerned with the cost and performance risks presented by such pricing; we did not say that an agency is required to reject such pricing even where, as here, the

agency has considered and discounted any potential cost or performance risks.

The protest is denied.

A handwritten signature in black ink, appearing to read "James F. Hinchman", is written over the typed name and title. To the left of the signature is a large, stylized, handwritten letter "J".

James F. Hinchman
General Counsel